STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC	)	
-vs-	)	
Illinois Bell Telephone Company	)	
	)	03-0553
Complaint concerning imposition of unreasonable	)	
And anti-competitive termination charges by	)	
Illinois Bell Telephone Company.	)	

REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) respectfully submits this Reply Brief on Exceptions in reply to the Brief On Exceptions of TDS Metrocom ("TDS") and Illinois Bell Telephone Company ("SBC"), which were filed in response to the Administrative Law Judge's Proposed Order issued by the Administrative Law Judge ("ALJ") on July 30, 2004 ("*Proposed Order*").

The Staff observes, as it did in its Brief on Exceptions, that the *Proposed Order* is well-reasoned, reviews the issues in a clear and concise manner, and reaches conclusions that correctly apply the relevant statutory provisions, Commission rules, and past Commission decisions concerning carriers' termination liability provisions to the record of this proceeding. Staff BOE, at 1. The Staff, consequently, had no exceptions but, rather, noted minor clerical type errors or omissions. *Id*. Both TDS and

SBC, however, took exception to certain portions of the Proposed Order. The Staff will address the respective parties' exceptions on issues on which the Staff took a position.

The TDS BOE

TDS accepted the Proposed Order's conclusion that SBC's current termination penalty provisions were not shown to be unreasonable nor anticompetitive without taking exception. TDS BOE, at 1-2. TDS, however, did take exception to the Proposed Order's findings and conclusions requiring the Staff to initiate a rulemaking to "determine whether the Commission should dictate the manner and limits of liquidated damage provisions in term service contracts . . .." *Proposed Order*, at 40.

In support of its exception, TDS argues the following: (1) that the Commission has already addressed and applied the applicable legal and competitive principles in the ASCENT case and in this proceeding so there is no need for a rulemaking, (2) a rulemaking would require significant time and resources of CLECs and ILECs unnecessarily, and (3) there is no reason for uniform regulation in this context because carriers' termination charge policies and provisions can differ as long as they are neither unreasonable nor anticompetitive. TDS BOE, at 3-4.

All of TDS' arguments appear to be based upon a presumption that the Commission *will* "dictate" to CLECs and ILECs the liability termination provisions contained in their term service contracts. This presumption would appear to be based upon a misinterpretation of the relevant findings and ordering paragraph contained in the Proposed Order.

In response to the TDS arguments, the Staff would point TDS to Findings and Ordering paragraph number (12), which provides in full the following:

> Staff is directed to commence a rulemaking to determine *whether* the Commission *should* dictate the manner and limits of liquidated damage provisions in term service contracts and whether local exchange carriers other than SBC should be required to provide written estimates of contract termination liabilities within five business days of receipt of written requests signed by SBC customers to representatives of competing local exchange carriers. (Emphasis added.)

Clearly, the Proposed Order's findings and ordering paragraph number (12) only orders the Staff to commence a rulemaking to determine *whether* the Commission *should* further address termination liability provisions on an industry-wide basis. The Staff has no pre-determined position on this issue.

As the Staff articulated in its Briefs, the Staff recommended an industry-wide rulemaking based primarily on (i) issues of fundamental fairness which would be attendant in singling out *only* SBC to be required to abide by certain termination penalty provision guidelines, and (ii) that in light of the fact that twice in the last three years CLECs have brought similar complaints regarding the issue of SBC's early termination penalty policies, which appeared to the Staff as an issue that is likely to reoccur on a case-by-case and carrier-by-carrier basis. Staff Initial Brief, at 15-16; Staff Reply Brief, at 4-5, 7-8. TDS, in stressing the importance of conserving scarce CLEC resources in an industry-wide rulemaking, ignores the efficient (or non-efficient) use of scarce Commission resources. Clearly, if the Commission will need to resolve complaints against SBC and other carrier's termination liability provisions on a complaint-by-complaint and carrier-by-carrier basis, the most efficient use of scarce Commission resources would be to address these issues all at once on an industry-wide basis. If, on the other hand, TDS (and the rest of the industry in Illinois) can make a compelling argument that the Commission will have no need to address repeated similar complaints regarding termination liability provisions, the Staff, as it noted in its Reply Brief[1], would take that argument into consideration in defining its position in the rulemaking. Again, under the Proposed Order's Findings and Ordering paragraph number (12), the first step in an industry-wide rulemaking would be to determine whether further Commission regulation would be necessary.

Finally, the Staff points out that SBC also complained about the prohibitive costs of an industry-wide rulemaking,[2] although SBC now supports an industry-wide rulemaking. Whatever the reasons for SBC's change of position regarding the rulemaking, clearly the once prohibitive cost of the rulemaking to SBC is now apparently not prohibitive at all. The Staff, moreover, would not speculate and rule out carriers other than SBC having outstanding issues regarding termination liability provisions that they may want resolved on an industry-wide basis, like SBC now desires. For all of these reasons and the reasons the Staff articulated in its Initial and Reply Briefs, the Staff recommends that the Commission order an industry-wide rulemaking adopting the language contained in the Proposed Order's Findings and Ordering paragraph number (12).

The SBC BOE

SBC took exception to the Proposed Order's finding and conclusions on the issues of (i) the requirement that SBC provide calculations of termination liability penalties to a CLEC when the CLEC has written authorization to request the calculation,

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[1] Staff Reply Brief, at 8 ("[A] primary purpose of an industry-wide rulemaking proceeding is for Staff to gather information from all the market participants and then to take a position based upon comprehensive market information rather than market information necessarily limited to two market participants.").

[2] SBC Initial Brief, at 29 ("Nor should a rulemaking proceeding be considered a benign and costless alternative to resolving the issues raised by TDS at this time.").

and (ii) the requirement that SBC reimburse TDS for its attorney fees and out-of-pocket external expenses through March 4, 2004. SBC, however, reversed course from its positions contained in its Initial and Reply Briefs (SBC Initial Brief, at 26-31; SBC Reply Brief, at 9-11) and did not take exception to the Proposed Order's findings and conclusions requiring the Staff to commence a rulemaking.

Although the Staff took no position on the Proposed Order's award of certain external attorneys fees to TDS, however, because of the way SBC framed this issue in its BOE, the Staff is compelled to briefly address this issue. SBC claims that: "The Proposed Order's *entire* analysis is premised on the assumption that SBC Illinois' prior policies resulted in termination liabilities on the order of 100% . . . " (emphasis added). " SBC BOE, at 10. SBC's assertion that the Proposed Order's "*entire* analysis" premise is flatly contradicted by the relevant language contained in the Proposed Order. As the Proposed Order pointed out: "In its testimony, SBC essentially conceded that the filing of the TDS complaint was the proximate cause of its review and revision of its termination policies," citing to SBC Ex. 1.0, p. 10. The Proposed Order could hardly be clearer. The Commission's conclusions and analysis on the award to TDS of certain external attorneys fees was based upon SBC's acknowledgement that the TDS complaint was "the proximate cause of its review and revision of its termination policies."

Further, SBC is distorting the Staff's reference to %100 termination penalties by taking it out of the context in which it appeared in Staff's Initial Brief and in the testimony of Staff witness Mr. Omoniyi. In both Mr. Omoniyi's testimony and in the Staff Initial Brief, the Staff was addressing the relationship between the ASCENT proceeding and this proceeding, which included the fact that in the ASCENT proceeding and in this proceeding, the size of SBC's termination liability provisions could be as high as 100%.

The Staff, moreover, reviewed the relevant record evidence and stands by its assertion that before SBC revised its early termination liability policies in March of 2004 that its term contracts contained termination liability provisions that could reach as high as 100%. *See* TDS Metrocom Ex. 1.0 (Loch), at 14 and Att. 1.2 ("Each of these agreements provides for a termination charge ranging from 50% to 100% of the minimum annual revenue commitment amount for the remaining term of the agreement."). SBC has *not* taken issue with TDS witness Loch's statement, which is essentially the same as the Staff statement SBC finds so offensive. SBC, furthermore, points to nothing points to no record evidence to support its assertion that the Staff is mistaken.

Because the record on this very narrow factual issue appears to be in controversy and, more importantly, is *not material* to the Proposed Order's findings and conclusions, the Staff recommends that the first full paragraph in the Proposed Order on page 38 be modified as follows:

> The fact that a CLEC complaint results in pro-competitive action by the ILEC is not the trigger for awarding fees under Section 13-514. The plain wording of the statute requires us to find that a telecommunications carrier "knowingly impede[d] the development of competition . . ." SBC introduced evidence that its termination penalties were similar in magnitude to the provisions still used by many CLECs in their term contracts. However, in the ASCENT case we found that the ~~100%~~ termination penalties imposed by SBC for ValueLink Services were inherently anti-competitive. It is reasonable to assume from this fact that SBC was on notice that the Commission considered contract termination penalties of the~~is~~ magnitude addressed in the ASCENT case to be anticompetitive, no matter what product is at issue. That other LECs (with far less market share to be anticompetitive with) employ similar provisions

is not a defense. The contract termination penalty provisions of those entities have not been put at issue before this Commission.

CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding and that the Proposed Order be modified as set forth in this Reply Brief on Exceptions and Staff's Brief on Exceptions.

Respectfully submitted,

Illinois Commerce Commission Staff

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